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UNITED STATES BANKRUPTCY COURT

## FOR THE DISTRICT OF OREGON

## PORLAND DIVISION

In re:

Case No. 10-30406-elp11

## Remington Ranch, LLC

**Debtor.**

**DEBTOR'S RESPONSE TO HOOKER  
CREEK COMPANIES, LLC'S MOTION  
TO DISMISS**

Remington Ranch, LLC, the debtor and debtor-in-possession in this Chapter 11 case (the “Debtor”) hereby files this response (the “Response”) to the Motion to Dismiss (the “Motion”) filed by Hooker Creek Companies, LLC (“Hooker Creek”) on March 16, 2011.

## I. INTRODUCTION

Consideration of any motion to dismiss or convert this case to Chapter 7 is premature.

Either are alternatives to be considered, if ever, only if Debtor's motion to sell its sole asset – the real property located in Powell Butte, Oregon (the "Property") – in a public auction (the "Auction") is not granted. On February 25, 2011, Debtor voluntarily withdrew its Fourth

1 Amended Plan of Reorganization (“Fourth Amended Plan”) in order to propose the Auction as a  
 2 procedure to sell the Property which would generate more money for its creditors.

3 On March 28, 2011, as ordered by this Court, Debtor filed a Motion for an Order (A)  
 4 Approving Bid Procedures, (B) Approving Forms of Real Property Purchase Agreement, Sale  
 5 Notice, and Sale Order, (C) Approving Sale of Property Free and Clear of Liens, Claims, and  
 6 Encumbrances, and (D) Scheduling a Sale Hearing to Consider Final Approval of Sale (the “363  
 7 Motion”).

8 A hearing on Debtor’s 363 Motion is scheduled for May 11, 2011, which is less than  
 9 three weeks away. If Debtor fails to convince the Court that it is in the best interest of all of its  
 10 creditors to sell the Property at an auction supervised by the Court, then the issue of whether this  
 11 case should be dismissed or converted may be revisited. However, Hooker Creek’s Motion is  
 12 premature, and because Hooker Creek cannot currently meet its burden of proof to demonstrate  
 13 “cause” for dismissal or conversion pursuant to Section 1112(b) of the Code, the Motion must be  
 14 denied.

## 15 II. BACKGROUND

### 16 A. *Jurisdiction and Venue*

17 1. On January 21, 2010 (the “Petition Date”), Debtor filed a voluntary petition (the  
 18 “Petition”) under the Bankruptcy Code.

19 2. Debtor is a commercial and residential property developer operating in Central  
 20 Oregon. Debtor’s Property consists of approximately 2,080 acres of real property located in  
 21 Powell Butte, Oregon, together with all improvements thereon.

22 3. Debtor is an Oregon limited liability company, which was formed in 2005 for the  
 23 specific purpose of developing the Property by constructing recreational facilities, including one  
 24 or more golf courses and a resort community, and including homes and overnight residences.

25 4. Debtor’s acquisition of the Property was financed, in part, with a loan from Columbia  
 26 River Bank, which was subsequently acquired by Columbia State Bank. Columbia State Bank is

1 Debtor's largest secured creditor and holds a lien against the entire Property in the principal  
 2 amount of approximately \$8 million.<sup>1</sup> Columbia State Bank has not moved to dismiss or convert  
 3 this Chapter 11 case.

4       5.     Debtor is in possession of the Property and is continuing to manage the Property as a  
 5 debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

6       6.     The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.  
 7 Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to  
 8 28 U.S.C. § 157(b)(2).

9       ***B. Post-Petition Developments***

10      7.     By Court order, Debtor was required to file its Plan of Reorganization ("Plan") and  
 11 Disclosure Statement on or before May 21, 2010. Debtor complied with this deadline and  
 12 properly filed its Plan and Disclosure Statement on May 21, 2010. Debtor subsequently filed a  
 13 First Amended Plan of Reorganization on July 14, 2010, a Second Amended Plan of  
 14 Reorganization on July 30, 2010, a Third Amended Plan of Reorganization on August 26, 2010,  
 15 and a Fourth Amended Plan of Reorganization on October 27, 2010. For purposes of this  
 16 Response, the term "Plan" is intended to reference all Plans of Reorganization filed by Debtor.

17      8.     On March 17, 2010, Debtor initiated an adversary proceeding against Hooker Creek,  
 18 Debtor's second largest creditor, to challenge the validity of Hooker Creek's improperly filed  
 19 claim of construction lien, which purported to encumber the entire Property. The construction  
 20 lien was subsequently declared invalid by this Court. Hooker Creek has appealed that decision  
 21 to the United States District Court for the District of Oregon (the "District Court"). The status of  
 22 Hooker Creek's construction lien remains in dispute, and, at present, Hooker Creek holds a  
 23 second trust deed encumbering part of the Remainder Piece and a third trust deed encumbering  
 24 another part of the Remainder Piece.

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25  
 26<sup>1</sup> Debtor's Plan and Disclosure Statement contemplate completing the development of Phase I of the Property and  
 reference a "Remainder Piece," which is not scheduled to be completed in Phase I. Columbia State Bank's lien  
 extends to Phase I and the Remainder Piece.

1       9.      Hooker Creek has caused significant delay in this Chapter 11 case by filing multiple,  
2 needless objections to Debtor's Disclosure Statement. A Confirmation Hearing cannot be set, nor  
3 can Debtor begin the process of distributing the Plan and Disclosure Statement to creditors or  
4 soliciting votes thereon, until a Disclosure Statement is approved. A timeline of Debtor's  
5 Disclosure Statement filings and Hooker Creek's objections is as follows:

- 6           a. Debtor filed its Disclosure Statement on May 21, 2010.
- 7           b. On July 1, 2010, Hooker Creek filed its objection to Debtor's  
8              Disclosure Statement.
- 9           c. Debtor filed its First Amended Disclosure Statement on July 14, 2010.
- 10          d. On July 15, 2010, Hooker Creek filed its objection to Debtor's First  
11             Amended Disclosure Statement.
- 12          e. Debtor filed its Second Amended Disclosure Statement on July 30,  
13             2010.
- 14          f. On August 3, 2010, Hooker Creek filed its objection to Debtor's  
15             Second Amended Disclosure Statement.
- 16          g. Debtor filed its Third Amended Disclosure Statement on August 26,  
17             2010.
- 18          h. On September 2, 2010, Hooker Creek filed its objection to Debtor's  
19             Third Amended Disclosure Statement.
- 20          i. Debtor filed its Fourth Amended Disclosure Statement on October 27,  
21             2010.
- 22          j. On November 16, 2010, the Court approved Debtor's Fourth Amended  
23             Disclosure Statement.

24       10.     Several creditors objected to Debtor's original Disclosure Statement filed on May 21,  
25 2010. However, Hooker Creek is the only creditor that objected to the First Amended, Second  
26 Amended, and Third Amended Disclosure Statements.

1       11.     Approximately five months were spent addressing Hooker Creek's repeated  
2 objections to the Disclosure Statements. Accordingly, Hooker Creek is largely responsible for  
3 delaying this proceeding.

4       12. The Court issued an order approving Debtor's Fourth Amended Disclosure Statement  
5 on November 16, 2010. As part of this order, the Court set the Confirmation Hearing for March  
6 7<sup>th</sup> through March 11<sup>th</sup> of 2011.

7       13. Pursuant to Debtor's request, on February 25, 2011, the Court held a status  
8 conference, at which time Debtor withdrew its Fourth Amended Plan and indicated its intent to  
9 file the 363 Motion. The Court established March 28, 2011 as the deadline for Debtor to file the  
10 363 Motion.

11       14. Debtor timely filed the 363 Motion on March 28, 2011, and a hearing is scheduled for  
12 May 11, 2011.

### III. ARGUMENT

14 Hooker Creek has moved to dismiss this action pursuant to Section 1112(b). Hooker  
15 Creek cites *In re Woodbrook Associates* for the proposition that a “bankruptcy court has broad  
16 discretion under 11 U.S.C. § 1112(b) to dismiss a Chapter 11 case for cause.” 19 F.3d 312, 316  
17 (7<sup>th</sup> Cir. 1994). This is a correct statement of the law prior to the 2005 amendments to the Code.  
18 However, this is not currently the law. Section 1112(b) was amended as part of the Bankruptcy  
19 Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Section 1112(b)(1) now  
20 provides:

“Except as provided in paragraph (2) of this subsection, subsection (c) of this section, and section 1104(a)(3), on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, *if the movant establishes cause.*”

1 11 U.S.C. § 1112(b)(1) (Emphasis added). Under current law, only if the moving party has  
 2 demonstrated cause does the Court have broad discretion to determine whether conversion *or*  
 3 dismissal is in the best interests of the creditors. *See, e.g., In re Products Intern, Co.*, 395 B.R.  
 4 101, 108 (D. Arizona. 2008) (“...prior to the enactment of BAPCPA, [courts] had discretion in  
 5 determining whether to dismiss or convert a case if cause had been shown. Now Section 1112(b),  
 6 as amended, provides that once cause has been shown, the Court’s discretion is limited.”).

7 Hooker Creek’s Motion should be denied because Hooker Creek cannot demonstrate  
 8 cause, such as would warrant dismissal or conversion to a Chapter 7 without an evidentiary  
 9 hearing.

#### 11     **A. Hooker Creek Has Not Met the Required Burden of Proof**

12     The case law interpreting Section 1112(b) is clear that the moving party has the burden of  
 13 proving that “cause” exists for conversion or dismissal by a preponderance of the evidence. *In re*  
 14 *Woodbrook Associates*, 19 F.3d at 317 (“Where a motion to dismiss for cause is opposed, the  
 15 movant bears the burden of proving by a preponderance of the evidence that cause exists for  
 16 dismissal of the debtor’s bankruptcy case.”).

17     As discussed below, Hooker Creek has failed to satisfy its burden to prove the existence  
 18 of cause for dismissal or conversion of the case, and the Motion should be denied.

#### 19     **B. What Constitutes Cause for Dismissal or Conversion Under Section 1112(b)?**

20     Section 1112(b)(4) provides a list of sixteen non-inclusive factors which provide “cause”  
 21 for dismissal or conversion of a Chapter 11 case. Of the Section 1112(b)(4) factors, Hooker  
 22 Creek relies on Section 1112(b)(4)(J) for the proposition that cause exists for dismissal because  
 23 Debtor has not yet confirmed a plan and Section 1112(b)(4)(M) for the proposition that cause  
 24 exists for dismissal because Debtor is unable to effectuate substantial consummation of a  
 25 confirmed plan. For the reasons stated below, Hooker Creek’s arguments are without merit.

1       **1. Section 1112(b)(4)(J)**

2       Section 1112(b)(4)(J) states that cause for conversion or dismissal includes Debtor's  
3 "failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this  
4 title or by order of the court." 11 U.S.C. § 1112(b)(4)(J). Hooker Creek argues as follows:

5       Debtor [acknowledged at the February 25, 2011 status conference] that it would not be  
6 able to finance a plan currently. Debtor therefore withdrew the Fourth Amended Plan two  
7 weeks before the scheduled confirmation hearing, and is not proposing an alternative plan  
8 of reorganization. Debtor's admissions and its withdrawal of the plan after over a year in  
bankruptcy amount to a failure to confirm a plan under Section 1112(b)(4)(J), and  
dismissal is warranted.

9 Motion, p. 2.

10       Hooker Creek's analysis is simply incorrect. Contrary to Hooker Creek's assertions,  
11 Debtor's 363 Motion proposes to sell the Property at an Auction supervised by the Court and,  
12 absent an agreement among creditors, contemplates that the Court will impress the net proceeds  
13 from the Auction with the existing liens and the Debtor will propose a liquidation plan to  
14 distribute proceeds after the claims allowance process.

15       Hooker Creek also ignores the fact that the time that Debtor has been in Chapter 11 is  
16 due, in large part, to Hooker Creek's litigation tactics. Approximately five months were wasted  
17 addressing Hooker Creek's numerous and repetitive objections to the Disclosure Statement. As a  
18 result, Debtor's Fourth Amended Disclosure Statement was not approved by the Court until  
19 November 16, 2010. It is not the Debtor that has prolonged this Chapter 11 case.

20       In addition, Hooker Creek fails to cite any case to support its argument that Debtor's  
21 year-long presence in Chapter 11 constitutes cause for dismissal under Section 1112(b)(4)(J).  
22 Hooker Creek's argument is unsupported by the plain language of Section 1112(b)(4)(J) or the  
23 surrounding case law. The fact that Debtor has been in Chapter 11 for slightly more than a year  
24 does not, in and of itself, constitute cause for dismissal for failure to confirm a plan. Cause exists  
25 only where the debtor has failed to comply with deadlines, whether prescribed by the Code or  
26 Court, for filing a plan of reorganization and disclosure statement or obtaining confirmation

1 thereon. Specifically, “only *mandatory deadlines set by the Code or by an order of the court*  
 2 provide the basis for invoking Section 1112(b)(4)(J) as a cause for *dismissal.*” 7 COLLIER ON  
 3 BANKRUPTCY ¶1112.04[6][J] (Emphasis added). Cause for dismissal under Section  
 4 1112(b)(4)(J) exists, therefore, only if Debtor has failed to comply with mandatory deadlines for  
 5 filing its Plan and Disclosure Statement or achieving confirmation of a plan.

6 Hooker Creek argues that dismissal of Debtor’s case is appropriate, and yet, Hooker  
 7 Creek fails to cite any mandatory deadlines (or any non-mandatory deadlines) that Debtor has  
 8 not met. Indeed, Hooker Creek cannot do so. Debtor timely filed its Plan and Disclosure  
 9 Statement, including all amendments to each. The Court has not established a deadline by which  
 10 Debtor must confirm a plan, nor is any such deadline in the Code. Debtor’s act of withdrawing  
 11 its Fourth Amended Plan in advance of the Confirmation Hearing cannot be labeled a failure to  
 12 confirm a plan.

13       **2. Section 1112(b)(4)(M).**

14       Hooker Creek also argues that this case should be dismissed, pursuant to Section  
 15 1112(b)(4)(M), because Debtor is unable to effectuate a confirmed plan. This section of the Code  
 16 is inapplicable because no plan has been confirmed. It is not possible for Hooker Creek to make  
 17 any viable argument under the facts of this case that Debtor has been unable to effectuate  
 18 substantial consummation of a confirmed plan.

19       It cannot be disputed that there is no reason to dismiss or convert this case now based on  
 20 Section 1112(b)(4)(M). This argument may, in fact, be completely frivolous. “Substantial  
 21 consummation” as defined in Section 1101(2) requires satisfaction of the following three  
 22 requirements:

- 23       (a) Transfer of all or substantially all of the property proposed by the plan to be  
 24 transferred;

25  
 26

1                             (b) Assumption by the debtor or by the successor to the debtor under the plan of the  
 2                             business or of the management of all or substantially all of the property dealt with by  
 3                             the plan; and

4                             (c) Commencement of distribution under the plan.

5 11 U.S.C. §1101(2).

6                             To support its argument that Debtor is unable to effectuate substantial confirmation of a  
 7 plan, Hooker Creek cites *In re 499 W. Warren Street Associates, Ltd. Partnership*, 151 B.R. 307  
 8 (1992). Hooker Creek misunderstands the Court's holding, which has no bearing on whether a  
 9 moving party has demonstrated cause sufficient to require conversion or dismissal under Section  
 10 1112(b)(4)(M). The *Warren Street* Court does not consider dismissal on that ground.

11                             The *Warren Street* Court did order dismissal of a Chapter 11 case; however, the Court did  
 12 not rely on, or even discuss, Section 1112(b)(4)(M). The Court determined that the debtor's plan  
 13 was patently unconfirmable where the debtor impermissibly classified the unsecured deficiency  
 14 claims of two undersecured creditors in separate classes in an attempt to gerrymander the  
 15 confirmation process. According to the Court, once these claims were properly classified in a  
 16 single class, the debtor would be unable to confirm a plan under the Code's cramdown  
 17 provisions. As such, the Court stated that it "must conclude that Debtor is unable to gain  
 18 acceptance of its Plan by an impaired class of claims. As a result, Debtor's Plan is  
 19 unconfirmable, and Debtor therefore has no prospect for an effective reorganization..." *Id.* at  
 20 314.

21                             *Warren Street* is distinguishable from Debtor's situation. Debtor's Plan, which was  
 22 voluntarily withdrawn, was never faced with an objection for improper classification. More to  
 23 the point, Debtor does not currently have a Plan before this Court, and withdrawing the Fourth  
 24 Amended Plan cannot be equated with the failure to achieve substantial consummation of a  
 25 confirmed plan. Rather, Debtor has satisfied the Court's deadline to file the 363 Motion, and  
 26 Debtor anticipates that the net proceeds of the Auction – if Debtor's 363 Motion is granted – will

1 necessarily be distributed to creditors pursuant to a liquidation plan, which will be filed after the  
 2 Auction. It is simply not possible at this juncture to determine whether Debtor will be unable to  
 3 effectuate substantial consummation of a plan.

4       ***C. Debtor's Filing Was Not in Bad Faith***

5           Hooker Creek's final allegation of cause for dismissal is that the Petition was filed in bad  
 6 faith. To determine whether a Chapter 11 plan has been filed in good faith, courts consider  
 7 whether: (1) the debtor has only one asset; (2) the debtor has an ongoing business to reorganize;  
 8 (3) there are any unsecured creditors; (4) the debtor has any cash flow or sources of income to  
 9 sustain a plan of reorganization or to make adequate protection payments; and (5) the case is  
 10 essentially a two-party dispute capable of prompt adjudication in state court. *In re St. Paul Self*  
 11 *Storage Ltd. Partnership*, 185 B.R. 580, 582-83 (9<sup>th</sup> Cir. BAP 1995).

12           Ultimately, the determination of whether a Chapter 11 petition has been filed in good  
 13 faith is based on the totality of the circumstances. *In re Marshall*, 403 B.R. 668, 690 (C.D. Cal.  
 14 2009), citing *In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1074 (9<sup>th</sup> Cir. 2002). Further, the Ninth  
 15 Circuit has held that "good faith is lacking *only* when the debtor's actions are a *clear abuse of the*  
 16 *bankruptcy process.*" *In re Arnold*, 806 F.2d 937, 939 (9<sup>th</sup> Cir. 1986) (Emphasis added).

17           Hooker Creek contends that Debtor has filed its Chapter 11 case in bad faith because:

- 18           (a)     Debtor has one asset, the Property;
- 19           (b)     Debtor has no employees except for a property caretaker and bookkeeper;
- 20           (c)     There is little or no cash flow;
- 21           (d)     There are no available sources of income to sustain a plan of reorganization; and
- 22           (e)     The Petition was filed on the "eve of a foreclosure sale." Motion, p. 3.

23           While it is true that the Petition was filed after foreclosure proceedings were initiated,  
 24 this, alone is insufficient to support a finding of bad faith. A pending foreclosure is a common  
 25 reason for a borrower, whose primary asset is real property, to file a Chapter 11 case. However,  
 26 the foreclosure action in this case was not the singular reason Debtor filed its Petition. The more

1 pressing reason was the assertion by Hooker Creek of an invalid construction lien. In addition,  
 2 the fact that a debtor files a Chapter 11 petition to avert a foreclosure or void an invalid lien does  
 3 not, by itself, establish an absence of an intent for rehabilitation, such as will permit dismissal for  
 4 bad faith. *In re Marshall*, 403 B.R. at 690.

5 Further, Hooker Creek's analysis ignores Debtor's 363 Motion. The Auction is intended  
 6 to provide the funds necessary to pay more than a single creditor. Hooker Creek's attempt to  
 7 portray this case as a dispute among secured creditors is equally misguided. Debtor has  
 8 numerous secured and unsecured creditors, including some creditors who are asserting security  
 9 interests that may not be valid. Both Debtor's creditors and the estate will benefit from this case  
 10 remaining in Chapter 11 where all priority issues can be adjudicated in the bankruptcy court.

11       ***D. If the Court Determines Hooker Creek Has Established "Cause," Conversion, rather  
 12 than Dismissal is Appropriate.***

13       Debtor maintains that Hooker Creek has failed to satisfy its burden of proof on the issue  
 14 of "cause." If, however, this Court is inclined to find cause, conversion, rather than dismissal, is  
 15 in the best interests of all the creditors and the estate.

16       If a moving party has demonstrated cause, the court must then determine whether  
 17 conversion and dismissal is in the "best interests of the creditors and the estate." *In re Superior  
 18 Siding & Window, Inc.*, 14 F.3d 240, 242 (4<sup>th</sup> Cir. 1994). Courts have great discretion in  
 19 determining whether conversion or dismissal is appropriate, and in deciding between the two  
 20 alternatives, the Court must consider what is in the best interests of all the creditors, not solely  
 21 the moving party. *Id.*

22       Hooker Creek seeks dismissal because it believes that such a course of action is in *its* best  
 23 interest. However, the majority of Debtor's creditors are best served by this case remaining in  
 24 bankruptcy, which will provide the only means whereby unsecured creditors could hope to  
 25 receive any distribution.

## IV. CONCLUSION

In light of the foregoing, Debtor respectfully requests that the Court deny Hooker Creek's Motion.

DATED this 21st day of April, 2011.

Respectfully submitted,

By: /s/ J. Stephen Werts  
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Attorneys for Debtor

## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **RESPONSE TO HOOKER CREEK COMPANIES LLC'S MOTION TO DISMISS** on:

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[X] by the US Bankruptcy Court's ECF noticing system, a full, true and correct copy thereof to the party, at the e-mail address shown above, on the date set forth below.

**AND BY:**

[X] by **MAILING** a full, true and correct copy thereof in a sealed, postage-paid envelope, addressed as shown below and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below:

Brian Depolo Hart Howerton Ltd One Union St. #3 San Francisco, CA 94111	Destination Resort Group c/o Glenn M. Kotara 56875 Nest Pine Dr. Bend, OR 97707
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DATED April 21, 2011.

/s/ J. Stephen Werts  
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Of Attorneys for Debtor